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IRS Tax Liens on Joint Bank Accounts

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COMMENT

IRS TAX LIENS ON JOINT BANK ACCOUNTS

A recent United States Supreme Court decision, *United States v. National Bank of Commerce*,[1] allows the Internal Revenue Service (IRS) to levy on jointly held bank accounts for the unpaid taxes of only one of the joint owners. No prior determination of ownership interests in the underlying property is required before the seizure takes place. This is possible because the right to withdraw, in and of itself, was held to be "property subject to levy."[2] Although the Court cautioned that the right to withdraw under state law may not always be characterized as property subject to levy by federal law, the decision logically extends to other types of accounts where persons with the right to withdraw have no corresponding right to possession of the underlying property. This Comment will discuss possible limitations on these extensions of the *National Bank of Commerce* rationale. Because levying on one joint tenant's right to withdraw denies all other joint tenants their right to withdraw and possess the underlying property, grounds for possible due process claims by nondelinquents will be discussed as well.

When National Bank of Commerce refused to honor the IRS levy on two bank accounts in the names of "Roy Reeves, Ruby Reeves or Neva R. Reeves" for the unpaid taxes of Roy Reeves only, the IRS sought enforcement of the levy in district court.[3] The district court refused to enforce the levy,[4] and the United states Court of Appeals for the Eighth Circuit affirmed the result reached by the district court decision.[5] The Supreme Court reversed the judgment of the court of appeals and ruled that the levy should be enforced.[6] The bank had maintained that the funds in the joint account were not subject to levy because neither the IRS nor the bank knew what portion of the funds held in the account actually belonged to the delinquent taxpayer. As a result, the bank did not consider the accounts to be properly subject

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1. 472 U.S. 713 (1985).
2. *Id.* at 721-22.
3. *Id.* at 716.
4. United States v. National Bank of Commerce, 554 F. Supp. 110 (E.D. Ark. 1982), *aff'd*, 726 F.2d 1292 (8th Cir. 1984), *rev'd*, 472 U.S. 713 (1985).
5. United States v. National Bank of Commerce, 726 F.2d 1292 (8th Cir. 1984), *rev'd*, 472 U.S. 713 (1985).
6. *National Bank of Commerce*, 472 U.S. at 733.

to levy. On remand to the court of appeals, the case was dismissed because it was mooted pending appeal, the tax debt having been paid by the taxpayer.[7]

The Supreme Court rejected the bank's argument by holding that neither of the two possible defenses for refusing to honor a tax levy[8] were available to the bank. The first defense is that the bank is not in possession of, or obligated with respect to "property or rights to property" subject to levy.[9] The bank can also lawfully refuse to honor a levy if the property is "subject to a prior judicial attachment or execution."[10] No prior attachment was present in this case, and the Court, by giving new meaning to the term "property or rights to property," precluded the bank from asserting that the delinquent's interest in the account was not subject to levy.

The Supreme Court held that the "unrestricted right to withdraw"[11] the money in the accounts constituted "property or rights to property" within the meaning of section 6331(a) of the Internal Revenue Code.[12] Because the banking relationship creates debtor liability for the bank to pay money to

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7. United States v. National Bank of Commerce, 775 F.2d 1050 (8th Cir. 1985). The court noted that: "What effect, if any, the mooting of this case may have, either for *res judicata* or *stare decisis* purposes, on the decision of the Supreme Court is not a question that needs to be addressed at this time." *Id.* at 1051.

8. Section 6332 of the Internal Revenue Code provides in relevant part:

> (a) Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall . . . surrender such property or rights . . . to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

I.R.C. § 6332 (1982).

9. *National Bank of Commerce*, 472 U.S. at 722. The Secretary of the Treasury is authorized by section 6331(a) to "levy upon all property and rights to property . . . belonging to such person" [liable to pay any tax]. . . . I.R.C. § 6331 (1982). If property "belongs to" a delinquent taxpayer, the property is subject to levy. *Id.*

10. *See supra* note 8 and accompanying text.

11. *National Bank of Commerce*, 472 U.S. at 725-26. It is unclear what the Supreme Court meant by "unrestricted" right to withdraw. Did they mean the delinquent's unrestricted rights, as against the bank or as against the other authorized signators or owners of the account? It seems unlikely that the Court would adopt a meaning which would limit the IRS' right to levy by means of private agreements between the co-owners or authorized signators. Therefore, the Court must have meant that "unrestricted" right to withdraw relates to the bank's obligations to the delinquent. However, the Court did note that the "government stood in Roy's shoes," which would indicate that the government would be bound by private agreements among authorized signators. *Id* at 729 n.13.

12. The majority felt the language of sections 6331(a) and 6332(a) "reveals on its face" what Congress meant to cover by the language "property or right to property." *National Bank of Commerce*, 472 U.S. at 719-20. To support its characterization of the unrestricted right to withdraw as "property or rights to property"

the authorized signators for the joint account, the Court found the bank "obligated with respect to" the delinquent taxpayer's right to withdraw the funds.[13] Although the idea that a bank account is property subject to levy is neither novel nor particularly alarming, defining the right to withdraw as property subject to levy, separate from the underlying property, creates many conceptual difficulties.[14] For example, would a prior attachment of a creditor on the underlying property interest *not* foreclose the government's right to levy on the right to withdraw since they are two separate property interests? The problem becomes clear when one tries to logically draw the line on applying the reasoning to other situations.

Justice Powell's dissenting opinion appears to be primarily motivated by a concern for the rights of innocent third parties.[15] By reading the judicial foreclosure remedy provided in section 7403[16] together with the administrative levy procedure of section 6331,[17] Justice Powell interpreted the statutory scheme to mean that a summary levy procedure was an inappropriate remedy for the IRS to utilize where the interest "belonging to" the tax delinquent is less than a full interest:

> In other words, [section] 6331 permits seizure and sale of property or property rights *belonging to* the delinquent, while [section] 7403 allows the Government to seize and sell any property right in which the delinquent

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the court cited several lower court decisions from the Fifth and Ninth circuits, as well as various district court decisions. The Court further bolstered its definition on the basis that "[c]ommon sense dictates that a right to withdraw qualifies as a right to property for purposes of [sections] 6331 and 6332." *Id.* at 725. Whenever the Court resorts to common sense arguments one should become wary of what is being said.

13. *Id.* at 722.

14. Justice Powell, in his dissent, succinctly stated the problem:

> The Government, however, is not levying on the mere right to withdraw, which is of little value without any right of ownership. The levy at issue reaches the underlying funds in the accounts—no matter whom they belong to. . . . That the delinquent might unlawfully convert the money of others to pay his taxes does not give the Government the right to do so.

National Bank of Commerce, 472 U.S. at 742 (Powell, J., dissenting).

15. *See, e.g., id.* at 735 (Powell, J., dissenting) ("The Court today, however, ignores the property rights of nondelinquents.").

16. Section 7403 of the United States Code gives the Attorney General, at the request of the Secretary of Treasury, the authority to sue "all persons having liens upon or claiming an interest in" property in which the Secretary seeks to enforce a lien for unpaid taxes. 26 U.S.C. § 7403(c) (1976). This remedy is available regardless of whether a levy has been made. Hence, it is useful where property not subject to levy needs to be reached by the tax collector. In such a proceeding, all interested parties are to be joined in the action where "the rights of all claims to and liens upon the property" are adjudicated. *Id.* § 7403(c).

17. Section 6331(a) of the United States Code gives the tax collector the authority to "levy upon all property and rights to property . . . belonging to such person." I.R.C. § 6331(a) (1982).

> has an interest—even a *partial* interest. . . . A property right in which the delinquent has only a partial interest does not "belon[g] to" the delinquent and hence is not susceptible to levy.[18]

Justice Powell also argued that his statutory interpretation was supported by Supreme Court precedent, and that the majority holding effectively overruled these previous decisions without expressly saying so.[19]

Furthermore, Justice Powell refused to accept the majority's characterization of the right to withdraw as a separate property right from that of the underlying property interest itself.[20] He maintained that the right to possession, use, and ownership of the funds were rights governed by state law, and rights for which the levy procedure provided no way of determining relative interests.[21] Under the majority approach, the state law right of the delinquent taxpayer, as against the bank, to withdraw all funds on deposit is a sufficient ownership interest for levy purposes without regard to the actual underlying right to possess the property. Whether owning the state law right to withdraw will be characterized as "property or rights to property" in the context of other types of accounts was not decided by the court,[22] but it is now clear that the question is controlled by federal law.[23]

Justice Powell asserted that the majority was actually defining the nature of the state law interest and not the federal consequence thereof, because "the levy at issue reaches the underlying funds in the accounts—no matter whom they belong to."[24] Under Arkansas law, all authorized signators of bank record were granted the right to withdraw all funds in the account. The purpose of the law was to protect banks from conversion liability.[25] In some states this type of ownership interest is extended to include an ownership interest in the underlying funds, with an immediate right to withdraw *and possess* all funds in the account. In such states, joint tenants effectively make

18. *National Bank of Commerce*, 472 U.S. at 737-38 (Powell, J., dissenting) (emphasis in original).

19. *See* Mansfield v. Excelsior Refining Co., 135 U.S. 326 (1890) (holding that the government could not levy on property rights in which the delinquent lessor had less than a complete interest, and that the government's subsequent summary sale of the premises conveyed to the purchaser only a leasehold interest rather than the entire fee); United States v. Rogers, 461 U.S. 677, 696 (1983) (Court interpreted sections 6331 and 7403 of the Internal Revenue Code and stated that notice and hearing are not needed for section 6331 "because no rights of third parties are intended to be implicated by section 6331."). Powell therefore contended that the majority was overruling its prior interpretation of the statutory scheme. *National Bank of Commerce*, 472 U.S. at 738-41 (Powell, J., dissenting).

20. *National Bank of Commerce*, 472 U.S. at 741 (Powell, J., dissenting).

21. *Id.* (Powell, J., dissenting).

22. *Id.* at 726 n.10.

23. *Id.* at 722-23.

24. *Id.* at 742 (Powell, J., dissenting).

25. *Id.* at 741 n.7 (Powell, J., dissenting).

a gift of any property deposited in the account to the other joint tenants because no cause of action could be maintained for conversion. Justice Powell maintained that although a levy was inappropriate in this case under Arkansas law, a levy on a joint account would be appropriate where the state law in question grants to the delinquent the right to possession in addition to the right to withdraw.[26]

The desire to save taxpayer dollars in streamlining governmental procedures is certainly commendable, and administrative convenience is a tax policy criterion which often weighs heavily in the drafting and interpretation of revenue collection legislation. The summary procedure employed in this case is extremely effective and efficient.[27] Under the statutory interpretation employed by the majority, the fact that the government is seizing money from someone who does not owe it *is no defense*.[28] This is about as efficient as a collection procedure can get! It is this language, combined with the right to withdraw being defined as property subject to levy, that is theoretically troubling.

Could the decision permit the IRS to levy on a delinquent's right to withdraw on partnership, corporate, or trust accounts for the unpaid taxes of the delinquent? An existing ruling would appear to limit the ability of the IRS to levy on partnership accounts for the unpaid taxes of one of the partners, but it is not clear that this would be binding on the agency if the levy is on the right to withdraw.[29] Absent a binding ruling,[30] the bank is not

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26. *Id.* at 744-45 n.9 (Powell, J., dissenting).

27. *Id.* at 733. The Court noted:

> If the IRS were required to bring a lien-foreclosure suit each time it wished to execute a tax lien on funds in a joint bank account it would be uneconomical, as a practical matter, to do so on small sums of money such as those at issue here. And it would be easy for a delinquent taxpayer to evade or at least defer his obligations by placing his funds in joint accounts.

Id.

The same can be said of partnership, trust and corporate accounts. The Court, in order to avoid an unacceptable tether on IRS collections may have created equally unacceptable intrusions on the rights of innocent third parties. Had the Court refused to decide the way it did, Congress would have been forced to legislate changes in the summary procedures to accommodate the various interests.

28. *Id.* at 726-29.

29. Revenue Ruling 73-24, 1973-1 C.B. 602, issued by the Internal Revenue Service, states: "a partnership checking account in a bank is not subject to levy to satisfy a tax assessed against an individual partner." *Id.* Because the ruling addresses only the propriety of levy on the underlying property in the account, it would appear that the ruling may not preclude levy on the right to withdraw from the partnership account.

30. As a general rule, agencies are bound by the legislative rules that they promulgate. *See* United States v. Nixon, 418 U.S. 683, 694-96 (1974). With regard to the IRS, however, it has been held that "informal publications all the way up to revenue rulings are simply guides to taxpayers, and a taxpayer relies on them at his

required to honor any levy on property or rights to property that it is not in possession of or obligated with respect to. The Court did indicate that the right to withdraw may not always qualify as "property or rights to property" in other contexts, so as a matter of federal law it may be determined that such a right for partnership, corporate, or trust accounts is not property subject to levy.[31] The bank will not know whether or not to honor such a levy however, until the court decides the issue, and to the extent that the delinquent is an authorized signator on the bank's signature card, the bank is obligated with respect to the delinquent's right to withdraw. This is so whether the withdrawal is from a corporate, partnership, or trust account since the bank is in no way obligated to inquire into a drawer's capacity once the signature cards are signed and approved by the entity establishing the account.

If the right to withdraw is subject to levy in the corporate, partnership, or trust context, then such accounts clearly would be subject to levy for the unpaid taxes of any delinquent who is an authorized signator. The Court stated that the fact that "another party or parties may have competing claims to the accounts is not a legitimate statutory defense."[32] Clearly, the partnership, corporation, or trust involved has a competing claim, but under the majority reasoning in *National Bank of Commerce*, they must wait to litigate their claim.

The Court pointed out, however, that Congress balanced all interests and provided the innocent joint owner with the "effective and inexpensive" remedy of suing the United States government.[33] In the meantime, the government will have the use of an innocent taxpayer's money and will continue to have that use until the taxpayer bears the costs of litigation to fight the arbitrary seizure by the government. In this sense, the majority contention that the levy procedure is merely a "provisional" remedy designed to protect the government's interest while underlying ownership interests are determined seems blindly unrealistic.

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peril." Caterpillar Tractor Co. v. United States, 589 F.2d 1040, 1043 (Cl. Ct. 1978). However, it has also been held that under some circumstances due process may require the IRS to follow its announced procedures. United States v. Leaney, 434 F.2d 7 (1st Cir. 1970).

31. *National Bank of Commerce*, 472 U.S. at 726 n.10. The ability to commingle funds in a publicly-held corporate account would be much more difficult than in a closely-held corporate account, partnership account, or trust account. Note, however, that the same policies of preventing delays in tax collection apply to these types of accounts.

32. *Id.* at 727.

33. Who are they kidding? The non-delinquent has nine months after seizure to bring suit to recover the property (or proceeds). *See* I.R.C. §§ 7426(a), (b)(4), 6532(c)(1) (1982). Note that the amendment to section 6331(d) requiring notice before levy may insure the nondelinquent's ability to comply with the time deadlines. *Id.* § 6331(d). It is not clear, however, that the notice provisions apply to nondelinquent cosignatories or co-owners on bank accounts. *See infra* note 37.

Furthermore, the corporate, partnership, or trust account could be used to elude tax collection as readily as the joint account. The unrestricted right to withdraw from a joint account under Arkansas law[34] and the right to withdraw from a corporate, trust, or partnership account are indistinguishable *in terms of the bank's obligations to the authorized drawers.*[35] Indeed, this is why it is difficult to imagine how the Court could distinguish the right to withdraw in the joint tenancy context from that in other types of accounts for purposes of defining property subject to levy.[36]

The absence of any notice to the nondelinquent adds to the implausibility of the Court's statutory interpretation. The delinquent receives notice at least twice prior to the levy. The first notice must alert the delinquent that a tax obligation is owed to the government, and a second notice is then required before a levy on specific assets can take place.[37] Prior to an amendment to

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34. *National Bank of Commerce*, 472 U.S. at 723-24.

35. Practically speaking, the right to withdraw and the underlying property interest are inseparable. If they were separable, a general creditor could presumably attach the underlying funds based on an ownership interest of a nondelinquent after the IRS had levied on a delinquent's right to withdraw. The IRS could be left with a worthless property interest in spite of its priority in time.

36. The amended section 6331(d) provides:

(d) requirement of notice before levy.

(1) In General.-Levy may be made under subsection (a) upon the salary or wages or other property of *any person with respect to any unpaid tax* only after the Secretary has notified such person in writing of his intention to make such levy.

(2) 10-Day Requirement.-The notice required under paragraph (1) shall be—

(A) given in person.

(B) left at the dwelling or usual place of business of such person, or

(C) sent by certified mail to such person's last known address, no less than 10 days before the day of the levy.

(3) Jeopardy.-Paragraph (1) shall not apply to a levy if the Secretary has made a finding under the last sentence of subsection (a) that the collection of tax is in jeopardy.

I.R.C. § 6331(d) (1982) (emphasis added).

37. The language of this amendment to section 6331 does not restrict the notice requirement to the taxpayer owing taxes, but instead directs that notice is to be given to "any person." This would seem by negative implication to validate the majority approach that administrative levy is an appropriate procedure when the property being levied upon may actually belong to someone other than the delinquent taxpayer. However, the legislative history does not indicate any Congressional awareness or concern about the rights of innocent third parties, but rather stated that "the law was amended to provide *a taxpayer* with written notice before a levy upon property." HOUSE-SENATE CONFERENCE COMM. REP. S. REP. No. 97-530, 97th Cong., 2d Sess. (Aug. 17, 1982) (emphasis added). In a more general statement, the House-Senate conference committee commented that: "Where appropriate, changes were made to provide additional safeguards without reducing the ability of the Internal Revenue Service to administer the internal revenue laws and to collect taxes." *Id.*

section 6331, which became effective on all levies made after December 31, 1982, the delinquent was only entitled to notice that a tax debt was owing. In sharp contrast, the innocent nondelinquent is not entitled, under the Court's interpretation of the statutory plan, to *any* notice that an obligation exists and it is even unclear that Congress intended by the amendment for notice to be given to the nondelinquent prior to levy.[38] Even assuming that notice were required for nondelinquents, this single notice may yield little relief since there is no corresponding procedure whereby the complaining party may require some brief hearing to prove ownership before or immediately after seizure. A full scale judicial proceeding following such a seizure should not be considered a sufficient remedy because it is not fair to subject innocent citizens to the delay, expense, and hardship of such an action.

The district court, in refusing to enforce the levy in this case, formulated a new procedure for the Internal Revenue Service to use which the court felt was more consistent with procedural due process.[39] Although the approach

38. Although the amendment to section 6331(d) may or may not require that a third party receive notice prior to levy, there is no corresponding statutory procedure provided for the innocent third party to keep the levy from taking place, or receive prompt redress of wrongfully seized property by having an opportunity to be heard. However, in most cases the joint tenant could simply withdraw all the funds, or the portion of the funds belonging to him or her once notice is received. Since the IRS may suspend the notice upon a finding that the property subject to levy may be in jeopardy, the new notice provision may give little practical relief from the potential unfairness of this procedure as it applies to nondelinquents. That is, with notice to the joint tenant, the property could be in jeopardy if the joint tenant has a right to withdraw all funds in the account.

39. The district court refused to enforce the levy on due process grounds. Evidently, at this stage in the proceedings both the government and the bank agreed that "only the portion of the joint account owned by the delinquent taxpayer can be levied upon." United States v. National Bank of Commerce, 554 F. Supp. 110, 113 (E.D. Ark. 1982), *aff'd*, 726 F.2d 1292 (8th Cir. 1984), *rev'd*, 472 U.S. 713 (1985). The IRS contended, however, that because no evidence was presented by each co-depositor of their respective ownership interest, it should be presumed that the funds belonged to the delinquent taxpayer. It is not clear when the evidentiary proceeding was to take place prior to the levy, since none is provided for statutorily. The bank, on the other hand, claimed that the government was required to show the respective ownership interests before any of the account could be subject to levy. *Id.* at 112.

Citing the three part analysis of Mathews v. Eldridge, 424 U.S. 319 (1976), the court felt compelled to formulate a procedure that would balance the interests of the government and the nondelinquent, while making sure that the marginal burdens of any procedure developed would not exceed its benefits. 554 F. Supp. at 114. To insure that the innocent taxpayer had notice and some opportunity to be heard, the court outlined the following procedure:

1. The bank must immediately freeze the assets upon service of the levy, and then notify the IRS of the names of all joint owners on the account.

2. The IRS then has a duty to notify the co-depositors of the levy action, allowing some brief period for response and setting out the legal basis for any claim of

may appeal to many persons' expectations regarding the proper balance between governmental power and individual property rights, the force of the argument was disregarded on appeal as courts have a duty to avoid deciding disputes on constitutional grounds whenever possible.[40]

The procedural due process arguments may still be relevant after the Supreme Court decision in *National Bank of Commerce*. The Court noted that the innocent third parties would be free to address the issue of adequacy of notice provided in sections 6343(b) and 7426 on remand,[41] but the record was too sparse for the Court to address those issues. The Court perceived no problems regarding the lack of a meaningful opportunity to be heard.[42]

The majority in *National Bank of Commerce* briefly noted that the constitutionality of the levy procedure "has long been settled."[43] This seems a bit broad, since one must ask: the levy procedure *as applied to whom*? For example, the Supreme Court cited the case of *Phillips v. Commissioner*[44] for the proposition that the constitutionality of the levy procedures has long been settled.[45] However, that case involved the propriety of enjoining a levy as it applied to a *delinquent taxpayer*, against whom an administrative finding of tax liability had been made prior to levy.[46] The Court stated in *Phillips*

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ownership they may have in the account.

3. If an inadequate or total lack of response is received in the time allocated therefore, the bank must relinquish the funds.

4. If the response adequately sets out a claim, the IRS must determine the portion subject to levy and the bank must then surrender that portion.

5. If any good faith dispute exists, the bank has the option of refusing to honor the levy without penalty. The IRS would then be required to bring suit to enforce the levy, naming all co-depositors as parties. *Id.* at 114-15.

40. United States v. National Bank of Commerce, 726 F.2d 1292, 1293 (8th Cir. 1984), *rev'd*, 472 U.S. 713 (1985).

41. On remand, the case was dismissed as moot. *See* United States v. National Bank of Commerce, 772 F.2d 438 (8th Cir. 1985).

42. *National Bank of Commerce*, 472 U.S. at 729 n.12. The timeliness and adequacy of any post or pre-seizure hearing required by due process may differ depending upon whether the delinquent taxpayer's rights are at stake, or whether it is some innocent third party whose property is being seized. The lack of comment by the Court on the opportunity to be heard could be viewed as an attempt by the Court to avoid clarifying this issue. Perhaps the Court simply felt any issue to be raised would not be worth arguing because Congress had expressed their judgment by providing the opportunity to sue the government later for wrongful levy. The question, however, is whether the Congressional judgment is constitutional.

43. *Id.* at 721 (quoting Phillips v. Commissioner, 283 U.S. 589, 595 (1930)).

44. 283 U.S. 589 (1930).

45. *See supra* note 43.

46. In *Phillips*, 283 U.S. 589, the Court refused to allow the taxpayer to get an injunction against an IRS seizure of his assets. *Id.* at 592. Prior to levy, the IRS had traced corporate assets subject to seizure for taxes into the hands of the plaintiff. *Id.* at 591. The taxpayer claimed that the code's allowance of enforcement of income tax liability against the transferee of corporate assets for the unpaid taxes of the

that "[w]here, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings *to secure prompt performance of pecuniary obligations* to the government have been consistently sustained."[47] The nondelinquent owes no pecuniary obligation, yet the government is securing prompt performance of the lack thereof by the utilization of summary procedures. *Phillips* simply did not address the issues as they appear in this context.[48]

The *Phillips* Court cited as controlling precedent three cases wherein a delinquent taxpayer wanted to prevent collection of an allegedly illegal imposition of tax by seeking injunction in state court.[49] The Court consistently held in those cases that constitutional claims by the delinquent had to be asserted within the statutorily prescribed forms of review, and that no injunction could issue without the presence of compelling circumstances.[50] Although all of those cases contained general language about the power of the government to impose and collect taxes,[51] these holdings were squarely based upon the notion of exhaustion of administrative remedies, not procedural due process.[52] Such remedies are adequate for due process purposes since the action taken is not arbitrary. That is, the IRS has reviewed the facts and made a determination that an obligation exists.[53]

In *Springer v. United States*,[54] the Court directly addressed a due process challenge to the levy procedures employed against a delinquent taxpayer. An assessment, or administrative finding of liability, had been made prior to levy.[55] The Court rejected the challenge, but on grounds[56] entirely unrelated

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corporation in which he was a shareholder was unconstitutional. The court ruled that the summary proceedings against the transferee were constitutional since there were two remedies provided in the code for the taxpayer to challenge his tax liability. *Id.* at 597-98.

47. 283 U.S. at 595 (emphasis added).

48. *See, e.g., Phillips*, 283 U.S. at 596.

49. *See* Graham v. duPont, 262 U.S. 234 (1923); Dodge v. Osborn, 240 U.S. 118 (1916); State R.R. Tax Case, 92 U.S. 575 (1875).

50. *Graham*, 262 U.S. at 255; *Dodge*, 240 U.S. at 122; *State R.R. Tax Cases*, 92 U.S. at 615.

51. *Graham*, 262 U.S. at 255; *Dodge* 240 U.S. at 122; *State R.R. Tax Cases*, 92 U.S. at 615.

52. *See* Cheatham v. United States, 92 U.S. 85 (1875). The *Phillips* Court cited this case to support the proposition that procedural due process is satisfied by the levy procedures. 283 U.S. at 596. In *Cheatham*, the Court held that the plaintiff was precluded from asserting a challenge to an allegedly erroneous tax assessment due to expiration of the six month statute of limitations. The holding had nothing to do with procedural due process. 92 U.S. at 89-90.

53. Section 6331(a) forbids a levy until 10 days after notice of the obligation has been given to the delinquent. *See infra* notes 88-90 and accompanying text.

54. 102 U.S. 586 (1880).

55. *Springer*, 102 U.S. at 587.

56. Four reasons were given for the rejection of the due process claim. First,

to modern due process analysis.[57] Aside from the outdated due process analysis, however, this should not be controlling where a nondelinquent is challenging seizure instead of a delinquent.

The majority in *National Bank of Commerce* may claim that the right to withdraw is a separate property interest from the underlying property itself, but the effect of seizing the delinquent's right to withdraw is to deny the nondelinquents any property interest in their right to withdraw and possess the underlying property.[58] Section 6331[59] was interpreted to authorize the deprivation of a property interest without any prior hearing or prompt post-seizure hearing, and perhaps without notice.[60]

Whenever governmental action operates to deprive a person of a constitutionally protected interest, procedural due process requires that the deprivation must be evaluated in terms of the *Mathews v. Eldridge*[61] balancing test to be lawful.[62] This test requires that the government's interest in avoiding increased administrative and fiscal burdens from additional procedures be balanced against the importance of the individual property interest at stake and the extent to which the additional proposed procedures would reduce the possibility of erroneous decision making.[63]

The importance of the potential interest of the nondelinquent which is at stake when the government levies on a joint bank account or any account with multiple authorized drawers cannot be determined as a general rule. It is quite conceivable, however, that persons would be put to considerable

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the only limitations upon the power of Congress to lay and collect taxes were those regarding exports. *Springer*, 102 U.S. at 593. Second, the levy procedure found its origins in ancient common law which the United States had adopted. *Id.* Third, the Court had sustained similar procedures in the case of Murray's Lessee v. Hoboken Land and Improvement, 18 How. 274 (1855). *Springer*, 102 U.S. at 594. Finally, the Court concluded that if the laws in question seemed too harsh it was for Congress, not the Court, to change them. *Id.*

57. *See* Ingraham v. Wright, 430 U.S. 651 (1977); Paul v. Davis, 424 U.S. 693 (1976); Mathews v. Eldridge, 424 U.S. 319 (1976); Fuentes v. Shevin, 407 U.S. 67 (1972).

58. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 570 (2d ed. 1983) [hereinafter NOWAK, ROTUNDA & YOUNG].

> When a creditor uses government-enforced procedures to take the property of his alleged debtor, the debtor-defendant is deprived of a constitutionally significant interest in property. This deprivation exists whether the government transfers the property from the debtor to the creditor or merely prevents the debtor from using the property until the termination of the judicial proceeding instituted by the creditor.

Id.

59. *See supra* note 9 and accompanying text.
60. *See supra* notes 37-38 and accompanying text.
61. 424 U.S. 319 (1976).
62. NOWAK, ROTUNDA & YOUNG, *supra* note 58, at 560.
63. *Mathews*, 424 U.S. at 335.

hardship to the extent that funds in the account are deposited and withdrawn continuously to support a business or family. To deny a person or business the ability to pay for food, clothing, or meet usual daily expenses of operation is a harsh penalty for the government to impose.[64] On the other hand, where the delinquent's money is placed in an account with a nondelinquent's name on it in order to evade and frustrate tax collection, the importance of the nondelinquent's interests is hardly compelling. The problem, of course, is that there is no way to evaluate how compelling the nondelinquent's interest is without some pre-seizure determination.[65] To the extent that a portion of the underlying property belongs to the nondelinquent, a vital property interest may very well be at stake. It is not responsive to say that because the government refuses to ascertain ownership interests, none exist (unless the IRS could convince us that the Emperor really did have on clothes).

A very brief, informal hearing before or immediately following seizure would go a long way in reducing the possibility of erroneous decision making. Deposit tickets, cancelled checks, and other account records certified by the bank, along with evidence of sources of income could be produced relatively easily and evaluated quickly. A temporary freeze could be implemented on the assets of the account pending review of the evidence produced. At this point, a much more informed decision would be made with regard to the propriety of a levy on an innocent citizen's assets.

The cost to the IRS in terms of fiscal and administrative burdens would probably be less than defending a judicial cause of action for wrongful levy.[66] Where the nondelinquent has no real interest in the underlying funds, the IRS can levy within a few days of when it would have otherwise.

It would appear from the *Mathews v. Eldridge* weighing process that some statutory change in procedures should be in order, given the Supreme Court's decision in *National Bank of Commerce*. However, both the post-deprivation tort remedy cases and the pre-judgment seizure cases dealing with due process offer somewhat analogous situations which may be relevant to due process analysis for the nondelinquent. For example, Professor Tribe has observed that:

> [P]ost-deprivation tort remedies under state law ordinarily protect even "core" liberty interests well enough to meet due process requirements, even though there is no opportunity for the individual to interact with a

64. NOWAK, ROTUNDA & YOUNG, *supra* note 58, at 560.

65. *See* Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (Supreme Court held that due process requires a hearing before a creditor can garnish the wages of an alleged debtor).

66. Compare this with the present procedure where an innocent citizen must retain expensive legal counsel and initiate a lawsuit against the United States government. Upon a finding in the plaintiff's favor, it is customary to make the plaintiff pay the costs incurred in recovery.

> government official in time to prevent (or even promptly redress) the deprivation of liberty or property in question.[67]

Hence, a post-deprivation lawsuit against the government might be found adequate for due process purposes, given the government's apparent interest in swift tax collection from anyone who has assets, regardless of liability. However, the cases in which the post-deprivation tort remedies have been held adequate involved very different factual contexts, and are worthy of closer examination to determine if the rules developed therein should be extended to this context.

In *Ingraham v. Wright*,[68] the Supreme Court held that neither notice nor a hearing are required prior to the imposition of corporal punishment in the public schools.[69] The Court utilized the balancing test of *Mathews v. Eldridge*[70] in reaching this conclusion. The Court initially recognized that the school child has a constitutionally protectable liberty interest in remaining free from such invasions of personal security. The risk of erroneous deprivation of the child's liberty interest was evaluated in terms of the traditional common law remedies, and the unique education atmosphere in which corporal punishment takes place. The Court concluded:

> [B]ecause paddlings are usually inflicted in response to conduct directly observed by teachers in their presence, the risk that a child will be paddled without cause is typically insignificant. In the ordinary case, a disciplinary paddling [does not] threaten[] seriously to violate any substantive rights. . . .[71]

The Court was concerned with the risk that the child would be "paddled without cause," recognizing therefore the unquestionable right of the school to inflict such punishment in the first instance, *with* cause.[72] The novelty of the school environment[73] has dictated a shift in favor of the state's authority in the balancing of interests in other school situations as well.[74] The risk that a paddling without cause would take place was viewed by the Court to be slight.

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67. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-19, at 559 (1978).
68. 430 U.S. 651 (1977).
69. *Id.* at 682.
70. 424 U.S. 319 (1976).
71. *Ingraham*, 430 U.S. at 676.
72. *Id.* at 678.
73. It seems proper that school officials must be given wide discretion in matters of discipline so that their educational mission can be carried out. The discretion of IRS officials, in seizing the assets of one person to pay the taxes of another without any prior showing of liability, cannot be viewed in the same light as the public school official's discretion in disciplinary matters.
74. *See* New Jersey v. T.L.D., 465 U.S. 325 (1985) (Court held that no warrant is required to search students on school premises who are under the authority of school officials, and that reasonable cause, not probable cause will justify such a search).

The Court observed that the common law tort remedies would reduce what risk there was to an acceptable level. In other words, the student could sue a teacher or other school official for assault and battery for any wrongful or extreme beating. Damages would be difficult to show absent some physical harm to the student, hence these remedies probably reduce the risk of violent or malicious beatings but not necessarily unjustified paddlings.[75] Given the nature of the educational function to be fulfilled, and the environment in which it must take place, this seems an acceptable accommodation. The Court finally concluded that because of the low incidence of abuse, the openness of public schools, and the existing common law remedies, the impracticality of imposing additional measures could not be justified given the intrusion into areas of primary educational responsibility that would necessarily take place.[76]

In *Paul v. Davis*,[77] the Court held that an interest in a person's reputation could not be viewed as "liberty" or "property" within the meaning of the fifth and fourteenth amendments, hence no due process protections were invoked.[78] In reconciling previous cases,[79] the Court explained that only when some right or status previously recognized by state law was altered or extinguished would the guarantees of the due process clause apply.[80] Hence in *Davis*, the plaintiff, whose picture and name were circulated around by the police to merchants on a list labeling all who were pictured therein as shoplifters, had no constitutional claim of deprivation under 42 U.S.C. section 1983. The Court reasoned that the state tort remedy for defamation was the appropriate remedy in such a situation.[81]

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75. *Ingraham*, 430 U.S. at 678-79.
76. *Id.* at 682.
77. 424 U.S. 693 (1976).
78. *Id.* at 712.
79. United States v. Lovett, 328 U.S. 303 (1946) (Court held that Congress forbidding payment of salary or compensation to three named government agency employees was an unconstitutional bill of attainder); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (plurality opinion held that "stigma" caused by Attorney General's designation of certain organizations as communist did not invoke due process clause of the fifth amendment); Wiseman v. Updegraf, 344 U.S. 183 (1952) (loss of job due to failure to sign state loyalty oath invoked due process protections because state did not distinguish between innocent and knowing membership in the associations named by the Attorney General's list); Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) (discharge under the circumstances of a government contractor did not violate due process requirements because no badge of infamy would foreclose future job opportunities); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (Court held that statute authorizing the "posting" of person's names who were determined to have become hazards to themselves or their families in order to forbid the sale of alcoholic beverages to such persons was unconstitutional; legal status of having the ability to purchase liquor was altered without procedural safeguards).
80. *Davis*, 424 U.S. at 712.
81. The Court speculated that allowing a constitutional claim in such a case

In both *Ingraham* and *Davis* the Court's decision to deny prior hearing and notice were influenced by the existence of state common law remedies.[82] If an authorized drawer wrongfully converted the funds in a bank account to his or her own use, claimants would be entitled to no more than a conversion action after the fact. It could be argued that the treatment should be no different just because the federal government is the converter.[83]

Several considerations should dissatisfy judges and legislators with this approach. First, because our taxation system is "voluntary," perceptions of fairness dictate taxpayer compliance.[84] Perceptions, not reality, are controlling here. Secondly, *Davis* should not be controlling because the Court's decision in that case was based upon the lack of any constitutionally protectable interest. Bank accounts have been found to qualify as a protectable property interest.[85] Thirdly, *Ingraham* should not be controlling because factors relevant to school discipline and internal procedures consistently require slightly different treatment for constitutional protections which are notably absent in these circumstances.[86] Finally, the historical underpinnings of a common law tort action for wrongful levy are nonexistent. Only a statutory cause of action is permitted after the seizure, and then only if it is brought in a timely fashion.[87] The rights of claimants against the IRS in such a situation are more analogous to the rights of claimants against creditors in the pre-judgment seizure context. That is, the deprivation is coming from a creditor, albeit an exalted one, not a nominal co-owner. Hence, the due process analysis of pre-judgment seizure cases may be more relevant.

Recall that as against the delinquent an assessment has been made which amounts to administrative finding that an obligation to pay some specified amount by a specific person exists.[88] No levy can take place until ten days

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would logically lead to claims from innocent bystanders' families who were accidently killed by police officers for loss of "life" under § 1983. *Id.* at 698.

82. In *Davis*, the Court found no protectable property interest and therefore did not employ the *Mathews v. Eldridge* balancing test. *Paul*, 424 U.S. 693. In *Ingraham*, the Court found a protectable property interest, but concluded that notice and prior hearing were not required by due process. *Ingraham*, 430 U.S. 651.

83. Justice Powell cryptically noted "[t]hat the delinquent might unlawfully convert the money of others to pay his taxes does not give the Government the right to do so." *National Bank of Commerce*, 472 U.S. at 742 (Powell, J., dissenting).

84. This policy consideration is vital when drafting and interpreting tax legislation. *See generally* Sneed, *The Criteria of Federal Income Tax Policy*, 17 STANFORD L. REV. 567 (1965).

85. *See infra* notes 98-99 and accompanying text.

86. *See supra* notes 73-74 and accompanying text.

87. *See supra* note 33 and accompanying text.

88. Section 6201 requires the Secretary to "make the inquiries, determinations, and assessments of all taxes . . . imposed by this title . . . which have not been duly paid . . . ." I.R.C. § 6201 (1982). Section 6203 provides that the assessment is made by "recording the liability of the taxpayer in the office of the Secretary in accordance

after the delinquent has received notice that the obligation exists.[89] Inherent in these procedures is a certain amount of fact finding and process which minimizes official discretion and therefore reduces the likelihood of arbitrary and capricious actions on the part of the IRS. Yet the nondelinquent who owes no obligations to the government does not even get the minimal protections of the fact-finding procedures that are accorded the delinquent in the assessment stages.[90] The levy procedures of section 6331 are to apply to the property or right to property of "any person liable to pay any tax." Without an assessment, the nondelinquent is not such a person. Furthermore, notice of the obligation which is owed to the government need not be sent to the innocent party. It is not even clear that the nondelinquent is entitled to notice prior to levy on the particular assets in question.[91]

The position which the nondelinquent is in therefore, is identical to that of an alleged debtor where a creditor seeks to seize assets prior to the rendition of any formal or informal finding of liability. In a series of cases decided in the late 1960s and early 1970s, the Supreme Court considered the process that is due an alleged debtor when a creditor seeks to seize property prior to judgment.[92] These cases have been said to stand for the proposition that a hearing must be had before one is finally deprived of a property interest, but *not* that a pre-seizure hearing is required if a full and immediate post-seizure hearing is provided.[93] However, it has also been observed that temporary deprivation of use and possession of property must still withstand due process scrutiny, and that the length and severity of deprivation are factors to be weighed in determining the appropriate form of hearing.[94]

In *North Georgia Finishing v. Di-Chem*,[95] the Court held that a Georgia statute authorizing pre-judgment seizure by writ of garnishment was defec-

with rules or regulations prescribed by the Secretary." Id. § 6203. A taxpayer cannot be a "person liable to pay any tax" within the meaning of the levy procedures of Section 6331(a) until an assessment is made.

89. *See* I.R.C. § 6331(a) (1982).

90. *See* Bull v. United States, 295 U.S. 247 (1935), where the Court explained:

> The usual procedure for the recovery of debt is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. The assessment superceded the pleading, proof and judgment necessary in an action at law, and has the force of such a judgment.

Id. at 260.

91. *See supra* notes 36-38 and accompanying text.

92. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (Court held that there must be a prior hearing before a creditor can garnish the wages of an alleged debtor); Fuentes v. Shevin, 407 U.S. 67 (1972) (Court held that a prior hearing is required before a creditor can obtain a pre-judgment attachment or replevin); Mitchell v. W.T. Grant, 416 U.S. 600 (1974) (Court held that trial judge could order sequestration of personal property with very few safeguards).

93. Mitchell v. W. T. Grant, 416 U.S. 600, 611 (1974).

94. *See* North Georgia Finishing v. Di-Chem, 419 U.S. 601, 606 (1975).

95. 419 U.S. 601.

tive. The statute was found objectionable in that case because a bank account was impounded and put beyond the use of the debtor during the pendency of litigation unless the alleged debtor could post a bond to protect the creditor, a creditor or his attorney could obtain a writ of garnishment with an affidavit containing only conclusory allegations and without personal knowledge of the facts, the writ was issuable by a clerk of the court rather than a judge, and there was no provision for an early hearing following seizure.[96] The Court pointed out that it was unwilling to draw a distinction between types of property for purposes of determining what due process protections were required.[97] Hence, the fact that a bank account and not consumer goods was the object of seizure was irrelevant for due process purposes.[98] The Court observed:

> Here, a bank account, surely a form of property, was impounded and, absent a bond, put totally beyond use during pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer.[99]

Hence, a statute authorizing pre-judgment seizure must be scrutinized to make sure that minimum due process requirements are satisfied.

Under the levy procedures as they are applied against a nondelinquent third party, a finding of liability is not made by anyone, not even a court clerk or IRS official.[100] Whether any notice prior to the seizure is required is unclear,[101] and none is required after seizure. The nondelinquent cannot post a bond in order to regain use of the funds, but must instead suffer from the property being "put totally beyond use during the pendency of the litigation on the alleged debt."[102] A hearing is not required before or after seizure, but the nondelinquent may initiate a lawsuit to recover the property if done in a timely way.[103] There is no provision for an early hearing.

The Supreme Court's reasoning in both *North Georgia Finishing v. Di-Chem*,[104] as well as that found in *Mathews v. Eldridge*,[105] dictates a re-evaluation of the levy procedures when applied against innocent third parties. Absent the more preferable and coherent result that could be achieved through legislation, the courts should be unwilling to expand *National Bank of Commerce* into other situations. Because the Court in *National Bank of Com-*

96. *Id.* at 606-07.
97. *Id.* at 608.
98. *Id.*
99. *Id.* at 606.
100. *See supra* note 87 and accompanying text.
101. *See supra* notes 36-37 and accompanying text.
102. *North Georgia Finishing*, 419 U.S. at 606.
103. *See supra* note 33.
104. 419 U.S. 601.
105. Matthews v. Eldridge, 424 U.S. 319 (1976).

merce left the due process issues open, lower courts will now be free to limit the effects of the decision on due process grounds. This would avoid having to make factual distinctions between rights to withdraw for various types of accounts which simply do not exist.

Because of the problems with taxpayer perceptions of fairness and actual fairness in a given situation, it is unfortunate that Justice Powell's interpretation of the statutory scheme for collection of overdue taxes did not carry the day. As a result of the decision reached, banking facilities have an apparent obligation to honor levies on property belonging to persons or entities who owe no taxes. The effect of honoring such a levy may be to deny nondelinquents of property without due process of law.

NANCY P. INMAN